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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TRAILBLAZER TECHNOLOGIES, INC. et al., Plaintiffs and Appellants, v. MICHAEL TIMOTHY REGAS etc., Defendant and Respondent.	B198171 (Los Angeles County Super. Ct. No. BS 102386 Consolidated with BC361325)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Nathan D. Wirtschafter, Corp., Nathan D. Wirtschafter and William Dickerman for Plaintiffs and Appellants.

Burkhalter Kessler Goodman & George, Daniel J. Kessler and Michael Oberbeck for Defendant and Respondent.

I.

INTRODUCTION

Plaintiffs and appellants Trailblazer Technologies, Inc. and Richard J. Brownstein II appeal from a judgment of dismissal after the trial court sustained a demurrer without leave to amend in favor of defendant and respondent Michael Timothy Regas (Regas).[1] We affirm.

II.

FACTS AND PROCEDURAL BACKGROUND

A. *Initial facts*[2]

By 2002, Trailblazer Technologies, Inc., doing business as The Transcription Company, had become the dominant provider of transcription services to the Los Angeles entertainment industry. Its clients included many television stations and studios. Richard J. Brownstein II was the sole shareholder, president, and director of Trailblazer Technologies, Inc. Hereinafter, for simplicity, we refer to Trailblazer Technologies, Inc. and Brownstein jointly as Trailblazer.

In 2002, Trailblazer met with Regas, an investment banker, about the possible sale, merger, or transfer of some or all of Trailblazer's assets or stock. Regas claimed to be a specialist in the transcription field with transactional experience.

Following the meeting, Regas sent Trailblazer an "overview letter" describing the services he would render to Trailblazer for a "liquidity event," i.e.,

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[1] Throughout the proceedings, Regas is identified as also being known by a number of other names including, Timothy Regas and Tim Michaels, as well as variations of these names. He was also sued as doing business as TR Capital.

[2] Following the usual standard of review from the sustaining of a demurrer, we accept as true all properly pled allegations in the pertinent complaint, facts contained in exhibits to the complaint, facts that are properly the subject of judicial notice, and those that reasonably may be inferred from the foregoing facts. (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305.)

the sale or merger of all or substantially all of Trailblazer's assets or stock. Beginning in 2002, Regas acted as Trailblazer's investment banker by advising, representing, and negotiating on its behalf. In this role, Regas received confidential financial and business information which he pledged to keep in strict confidence. By August 18, 2002, Regas and Trailblazer had executed a fee agreement. Neither the overview letter nor the fee agreement contain an arbitration provision.

Regas located RapidText, Inc. (RapidText) that eventually would merge with Trailblazer to become "The Transcription Company, a California corporation." A material condition of the proposed merger was that RapidText would contribute all of its entertainment assets to the new entity.

Jerry Woods was RapidText's president, chief financial officer, and director. He was the majority shareholder of the company. RapidText provided a spreadsheet showing that its entertainment assets had a value of at least $500,000. In a single conversation, Woods told Regas that the spreadsheet was accurate. Otherwise, Regas performed no act of due diligence to determine if RapidText had $500,000 in entertainment assets to contribute to the merger. RapidText's representation about the value of it entertainment assets was an intentional, material, misrepresentation.

Trailblazer was unaware of this misrepresentation and, based thereon, entered into several agreements, resulting in a contract to merge Trailblazer with RapidText. These agreements included a contribution agreement.

The contribution agreement was executed on May 9, 2003. It required binding arbitration of controversies arising out of the agreement. Paragraphs 3.8A and 3.9A of the contribution agreement acknowledged that $50,000 would be paid to Regas for the investment banking fee owed to him by Trailblazer. Thus, Regas was a third-party beneficiary of the merger agreement between Trailblazer and RapidText.

B. *The initial proceedings in the arbitration*

In March 2005, Trailblazer commenced an arbitration before the American Arbitration Association entitled *Richard Brownstein and Trailblazer Technologies, Inc., etc., et al. v. The Transcription Company and RapidText, Inc., etc., et al.* (Case No. 72 489 Y 00286 05 CALC). The Honorable Philip M. Saeta, retired, was selected as the arbitrator. The parties engaged in extensive discovery and filed numerous motions.

In a second amended explanation of claims (SAEC), Trailblazer detailed its accusations to be determined in the arbitration. In the SAEC, Trailblazer named the following as opposing parties: The Transcription Company; RapidText; Woods; Regas; and Glory Johnson, a RapidText corporate officer, director, and/or shareholder. Regas was identified as an agent, joint venturer, successor-in-interest, employee, and partner of RapidText and a RapidText board member. Among other allegations, Trailblazer alleged that Regas had facilitated extensive negotiations resulting in the merger. Trailblazer further alleged the following: the false statements and concealments made by RapidText and its agents, including Regas, with regard to the amount of RapidText's entertainment assets induced Trailblazer to enter into the merger agreement; Regas was a third-party beneficiary of the contribution agreement through paragraphs 3.8A and 3.9A; Trailblazer had been forced to bring a civil lawsuit requesting the superior court order RapidText to turn over corporate documents; after the superior court entered such an order, RapidText, Woods, Johnson, or Regas made changes to the RapidText accounting books; and these retroactive accounting changes benefited RapidText at the expense of Trailblazer.

Regas was specifically named as a respondent (or defendant) in the SAEC's allegations of fraud in the inducement, negligent misrepresentation, fraud, and concealment of material facts. There were many other allegations of impropriety against RapidText that did not include allegations against Regas.

C. *Trailblazer acts to compel Regas to participate in the arbitration*

In December 2005, Judge Saeta sent a communication to counsel with regard to the arbitration. In the letter, Judge Saeta stated in part that pursuant to a motion to amend Trailblazer's explanation of claims, "[t]he claim is deemed so amended. The arbitrator notes that this motion seeking affirmative relief from the existing parties and also Jerry Woods, Glory Johnson and Timothy Regas, came at a time when Woods and Johnson were, by cross claim, seeking relief from Claimants and Regas was a third-party beneficiary of an underlying contract between the parties. The arbitrator thus determined that Woods, Johnson and Regas are considered . . . parties to this arbitration."

On December 30, 2005, Trailblazer notified Regas of the ongoing arbitration proceedings and of his right to file an answering statement. Regas did not respond.

On March 28, 2006, Trailblazer filed a petition to compel arbitration in the Superior Court in Case No. BS102386 entitled *Trailblazer Technologies, Inc., a California corporation; Richard J. Brownstein vs. Michael T. Regas, etc.* In its petition, Trailblazer sought to compel Regas to arbitrate the controversy "as part of the ongoing arbitration before the American Arbitration Association, *Trailblazer Technologies, Inc., etc., et al. vs. RapidText, Inc., etc., et al., AAA Case No. 72 489 Y 00286 05 CALC.*" Trailblazer stated, in part, that "Regas . . . was and is a third-party beneficiary of the [contribution agreement] by virtue of paragraphs 3.8A and 3.9A thereof, which provide that he is entitled to a 'commission or finder's fee' under the Agreement. [Regas] is thus bound by the arbitration provisions of the Agreement." Trailblazer also stated that the arbitration provisions of the contribution agreement required that Trailblazer and Regas "arbitrate their controversy in its entirety." Regas did not respond to the petition.

In conjunction with its March 28, 2006, petition, Trailblazer filed in Case No. BS102386, a notice of related cases, seeking an order relating to the petition

in Case No. BS102386 with Case No. BC345033, a previous lawsuit arising from the RapidText arbitration. Trailblazer alleged that "[b]oth [Superior Court] cases involve the same arbitration with the same parties. The present case is to compel a contracting party to arbitrate; the related case is by closely related parties to enjoin the arbitration. Similar issues." Thereafter, on July 19, 2006, the trial court found that the two Superior Court cases were not related.

On June 26, 2006, Trailblazer filed a motion in the Superior Court in Case No. BS102386 requesting that the court order Regas to arbitrate the controversy "within the arbitration proceeding known as *Trailblazer Technologies, Inc., etc., et al. vs. RapidText, Inc., etc., et al.,* AAA Case No. 72 489 Y 00286 05 CALC." The motion was "made pursuant to California Code of Civil Procedure §1281.2 on the grounds that [Regas] is a third-party beneficiary of a contract that requires the parties to arbitrate their disputes and that [Regas] refuses to arbitrate." Trailblazer informed the Superior Court that "[t]hird-party beneficiaries are treated as parties to the contract and are bound by its arbitration provisions. . . . [¶] . . . [¶] The arbitrator, Judge Saeta, has already determined that Regas is a third-party beneficiary, by virtue of the unambiguous language of paragraphs 3.8A and 3.9A of the Agreement." Trailblazer stated that the dispute against Regas was "the same dispute as the one already being arbitrated by Judge Saeta . . . ." Regas did not file an opposition to the motion.

On July 27, 2006, Regas did not appear at the hearing on the motion at which time Judge Jones granted the motion. However, Judge Jones did not decide if Regas was to be ordered to participate in the arbitration proceedings before Judge Saeta. Rather, Judge Jones left that decision to Judge Saeta. Judge Jones also invited Trailblazer to file a motion if it believed that the court should make a further ruling.[3]

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[3] The following is the complete record of the July 27, 2006 hearing, other than when counsel for Trailblazer introduced himself:

"The Court: *Trailblazer Technologies vs. Michael Regas.*

D. *The arbitration*

The arbitration before Judge Saeta occurred from September 5, 2006 through September 15, 2006. Trailblazer did not dismiss Regas from the arbitration proceedings or request Judge Saeta make any orders with regard to Regas's participation in the arbitration. However, Regas did testify.

The arbitrator, Judge Saeta, issued a letter on September 25, 2006, addressing only those "claims that were pursued in [Trailblazer's] trial brief and argument . . ." and those made in RapidText's statement of counterclaim that had been pursued. The arbitrator found the following: RapidText and its president Woods made an intentional, material, misrepresentation that RapidText had $500,000 in entertainment assets, when it did not. "Nevertheless, the reasonable reliance element of fraud [was] missing. The $500,000 was a bargained for number along with the bargained for valuation of [Trailblazer] at $380,000 and

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". . .

"The Court: Good morning. All right. Counsel, this motion -- this matter is on calendar for [a] motion to compel arbitration. [¶] Do you wish to be heard on that motion?

"[Counsel for Trailblazer:] If Your Honor will give me the . . . benefit of the tentative ruling, I'll be happy to respond to it.

"The Court: The Court is going to grant the one petition to compel arbitration. The Court will set a completion date for that arbitration February 7th of 2007, and we'll have a post-arbitration hearing on March 9th of 2007 at 8:30 a.m. in this department. And, Counsel, you're to give notice.

"[Counsel for Trailblazer:] Your Honor, there is an ongoing arbitration as noted in the [] papers before Judge Saeta.

"The Court: Yes.

"[Counsel for Trailblazer:] Would Your Honor be willing to order this arbitration to be part of that arbitration? It's the one same --

"The Court: I don't want to make that particular order at this juncture, Counsel. If it comes to it, I think Judge Saeta makes the determination. If it's something that you feel the Court should make a ruling on, the opposition should have an opportunity to object to that, so we'll have to take that part up at a later date. I'm sure they would go along with that, and you're to give notice, Counsel.

"[Counsel for Trailblazer:] I will do. Thank you, Your Honor.

"The Court: Sure. Thank you."

memorialized not as a representation by [RapidText], but as an agreed number in the Contribution Agreement." "Regas, who was presumably acting for [Trailblazer], did no due diligence to ascertain if in fact Rapid[Text] had $500,000 in entertainment assets. Just taking the word of Woods was not a reasonable thing to do. Regas claimed he was not asked to do due diligence on this by [Trailblazer]. It appears to me as [Trailblazer's] agent and an expert in investment banking, that Regas should have tested the veracity of Woods' numbers."

In his September 25, 2006, letter, and in the final award that incorporated the letter, the arbitrator also made many other findings that are irrelevant to the present appeal. The arbitrator awarded Trailblazer a number of different remedies against RapidText, Woods, and Johnson, but not Regas.

Upon Trailblazer's motion, the superior court confirmed the final award on November 30, 2007.

E. *The present proceedings against Regas*

On November 2, 2006, in Superior Court Case No. BC361325, Trailblazer filed a lawsuit in which Regas was the sole named defendant. Trailblazer recounted the events that had transpired regarding its retention of Regas and its merger with RapidText. In the general allegations, Trailblazer stated in part, that "[b]ased on [Regas's] status as a third-party beneficiary under the Contribution Agreement . . . Regas was sued as a co-defendant in the Arbitration. Even though he had been served, Regas failed to appear at the arbitration, and [Trailblazer was] forced to file an action in Superior Court to order him to arbitration, in [*Trailblazer v. Regas*,] LASC No. BS 102386. On July 27, 2006, the Hon. Morris B. Jones . . . ordered Regas to arbitration on the claims based on the Contribution Agreement, with the arbitration to be completed by February 7, 2006."

In its complaint against Regas, Trailblazer alleged four causes of action: breach of contract; breach of duty of good faith and fair dealing; breach of fiduciary duty; and unfair business practices (Bus. & Prof. Code, § 17200).

Among other allegations, Trailblazer alleged that Regas concealed material information, failed to investigate the value of the assets RapidText would contribute to the merger, and failed to properly advise Trailblazer. Trailblazer further alleged that Regas had a conflict of interest because he was a RapidText director while representing Trailblazer.

On November 16, 2006, in Case No. BC361325, Trailblazer filed a notice of related cases stating that "[a]fter . . . Regas . . . failed to appear at [the arbitration] proceeding[, Trailblazer] filed a Petition to Compel arbitration. [¶] That Petition to Compel arbitration is entitled Trailblazer Technologies, Inc. et al. v. Michael T. Regas, LASC No. BS 102386. On July 27, 2006, the Hon. Morris B. Jones . . . ordered Regas to arbitration on the claims based on the Contribution Agreement, with the arbitration to be completed by February 7, 2006. [¶] The actions may be related in that they involve the same parties, although the claims are somewhat different. . . . The events and transactions are quite similar and some of the relevant agreements are similar. . . . The questions of law are similar. . . ."

On November 20, 2006, the Superior Court related the two cases. On December 22, 2006, the trial court consolidated the two cases and designated Case No. BS102386 as the lead case.

Regas demurred on the grounds of exclusive concurrent jurisdiction, res judicata, and collateral estoppel. Regas asserted, "[t]his is the second Complaint filed by [Trailblazer] against Regas involving the same exact set of operative facts, claims, parties, and damages. The new Complaint follows on the heels of an arbitration award [Trailblazer] received barely two months ago. [Trailblazer] acknowledge[s] in [its] new Complaint not only the existence of this arbitration – but [admits that it] fought for and won an order compelling Regas to participate in that arbitration. According to [Trailblazer's] own admissions, Regas was a party to – and testified at – the arbitration, and [Trailblazer] alleged the same claims against him in that arbitration that [it] now pursue[s] in this forum."

Oral argument on the demurrer was heard on January 18, 2007. Trailblazer argued that "Judge Jones . . . did not specifically order Mr. Regas to attend the arbitration before . . . Judge Saeta. . . . When Regas appeared at the arbitration, he only appeared as a witness. He never appeared at the arbitration as a party, and Judge Jones never ordered him to appear at arbitration as a party." The trial court rejected this argument stating in part, "I am looking at the petition to compel arbitration in BS102386. Michael Regas is the first named defendant in the caption. The [minute order for the July 27, 2006, hearing] simply indicates that petitioner's motion to compel arbitration is granted. There is no distinction between compelling arbitration and the court's ordering the matter to arbitration." The court continued, "I don't see the distinction between 'ordered to arbitration' and being ordered to participate; and on that basis the Court will sustain the demurrer without leave . . . and, additionally, under the primary rights doctrine." The trial court found that "the issues related to the instant Complaint are the [same] issues that were addressed in the arbitration."

The trial court sustained the demurrer without leave to amend. Trailblazer appealed from the subsequently entered judgment of dismissal. We affirm.

III.

DISCUSSION

The dispute in this appeal involves whether the arbitration decision by Judge Saeta forecloses Trailblazer from pursuing Regas in this civil lawsuit. The appeal raises issues of res judicata and collateral estoppel. We find unpersuasive Trailblazer's arguments that it should be able to proceed with this civil lawsuit against Regas.

A. *The standard of review*

With regard to a demurrer, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]" (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; accord, *SC*

Manufactured Homes, Inc. v. Liebert (2008) 162 Cal.App.4th 68, 82.) "If the court sustained the demurrer without leave to amend, . . . we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

B. *The effects of an arbitration award on res judicata and collateral estoppel*

"Res judicata prohibits the relitigation of claims and issues which have already been adjudicated in an earlier proceeding. The doctrine has two components. ' "In its primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action.". . . The secondary aspect is "collateral estoppel" or "issue preclusion," which does not bar a second action but "precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding." ' [Citations.]" (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335; see also *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828 (*Vandenberg*).) " 'The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' . . . [Citation.] [¶] Generally speaking, under the above doctrine a valid final judgment, if in favor of the plaintiff, merges the cause of action in the judgment. [Citations.]" (*Busick v. Workmen's Comp. Appeals Bd*. (1972) 7 Cal.3d 967, 973, italics omitted.)

"The doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, 'rests upon the sound policy of limiting litigation by preventing a party who has had *one fair adversary hearing* on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.' [Citation.]" (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.)

In *Vandenberg, supra*, 21 Cal.4th 815 the Supreme Court held that a private arbitration award, even if judicially confirmed, does not have collateral estoppel effect in favor of third persons who were not parties to the arbitration unless the arbitral parties agreed in that particular case that such a consequence should apply. (*Id.* at p. 834.) However, *Vandenberg* narrowly drew its holding and specifically reaffirmed the holdings in prior cases with regard to the res judicata effect of an arbitration award. *Vandenberg* stated: "Our holding is narrowly circumscribed. Nothing in our decision imposes or implies any limitations on the strict res judicata, or 'claim preclusive,' effect of a California law private arbitration award. (See, e.g., *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 756-761 [unconfirmed award in private arbitration between homeowner and general contractor is res judicata barring homeowner's identical claim against subcontractor]; *Sartor v. Superior* Court (1982) 136 Cal.App.3d 322, 327-328 [confirmed private arbitration award in favor of architectural firm is res judicata barring homeowner's identical causes of action against firm's employees].)" (*Vandenberg, supra*, at p. 824, fn. 2.) *Vandenberg* also cautioned that its opinion did not address the preclusive effect of a private arbitration award in subsequent litigation between the *same* parties on different causes of action. (*Ibid*; see also discussion in *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 577-578.)

C. *The trial court did not err in concluding that res judicata barred Trailblazer from pursuing this civil lawsuit against Regas.*

In pleadings before the arbitrator Judge Saeta and before the superior court, Trailblazer consistently alleged that Regas was, and should be, a party to the arbitration. Trailblazer argued that Regas's actions were instrumental to the merger agreement and that the arbitrator had, and should have, jurisdiction to address the controversies between Trailblazer and Regas. Further, Judge Saeta acknowledged that Regas was a party to the arbitration and the Superior Court granted Trailblazer's motion to compel Regas to arbitration.

We begin by listing the numerous times that Trailblazer argued for, and admitted that, Regas was, or should be, a party to the arbitration. In Trailblazer's SAEC it enumerated the allegations to be addressed in the arbitration and named Regas as an opposing party. The SAEC included allegations that Regas had made false statements and concealments with regard to the amount of entertainment assets RapidText would contribute to the merger. When Regas did not respond to the notice of arbitration, Trailblazer filed a petition to compel Regas to participate in the arbitration, informing the superior court that Regas was a third-party beneficiary of the merger contract through paragraphs 3.8A and 3.9A of the contribution agreement providing for payment of Regas's commission or finder's fee. Trailblazer asserted that Regas's third-party status demanded that its dispute with Regas be arbitrated. Trailblazer further alleged that the arbitration provisions of the contribution agreement required that Trailblazer and Regas "arbitrate their controversy in its entirety." In Trailblazer's notice of related cases filed in conjunction with its petition to compel arbitration, Trailblazer stated that "[b]oth [Superior Court] cases involve the same arbitration with the same parties. The present case is to compel a contracting party to arbitrate; the related case is by closely related parties to enjoin the arbitration. Similar issues." In its June 26, 2006, motion to compel Regas to arbitrate, Trailblazer justified its request by stating "that [Regas] is a third-party beneficiary of a contract that requires the parties to arbitrate their disputes" and as such, is to be "treated as [a party] to the contract . . . bound by its arbitration provisions. . . . [¶] . . . [¶] The arbitrator, Judge Saeta, has already determined that Regas is a third-party beneficiary, by virtue of the unambiguous language of paragraphs 3.8A and 3.9A of the Agreement." Trailblazer stated that the dispute against Regas was "the same dispute as the one already being arbitrated by Judge Saeta . . . ."

Thus, according to Trailblazer, the allegations against Regas had to be resolved in the arbitration, and its dispute against Regas was the *same* as the dispute being adjudicated in the arbitration before Judge Saeta and involved

closely related parties. Trailblazer is foreclosed from taking an inconsistent position on appeal.

Further, the trial court granted Trailblazer's motion to arbitrate concluding that Trailblazer was to arbitrate its dispute against Regas.

Lastly, Judge Saeta acknowledged that Regas was a party to the arbitration before him. In his December 2005, letter, Judge Saeta stated that Regas was a party to the arbitration when he stated in a letter that he had "determined that Woods, Johnson and Regas are considered as parties to this arbitration."

Thus, Trailblazer's prior statements conceded that Regas was a party to the arbitration, a position accepted by the superior court as well as Judge Saeta, the arbitrator.

Trailblazer asserts that Regas was not a party to the arbitration. Trailblazer notes that when the superior court ordered Regas to arbitrate, the court (Judge Morris) declined to order Regas to participate in the ongoing arbitration before Judge Saeta, but left that decision to Judge Saeta. However, Judge Saeta already had decided that Regas was a party to the arbitration, a decision that was consistent with Trailblazer's SAEC that had named Regas as an adversary party. Trailblazer never dismissed Regas from the arbitration. Further, if there was any uncertainty, Trailblazer was given the options of addressing the issue with Judge Saeta or returning to the superior court to obtain a further order. Trailblazer did neither. There is no indication in the appellate record that Trailblazer was foreclosed from presenting its case against Regas in the arbitration before Judge Saeta.

Hence, res judicata precludes Trailblazer from re-litigating issues that would have or could have been litigated in the arbitration.

Trailblazer asserts that res judicata does not preclude this civil lawsuit against Regas because the stated causes of action in the arbitration did not encompass those alleged in this lawsuit. Trailblazer states that the civil lawsuit involves accusations relating to Regas's breach of fiduciary obligations owed to

Trailblazer as Trailblazer's agent, whereas the arbitration involved only the misrepresentation with regard to the value of RapidText's assets. In making this argument, Trailblazer states that Regas "was not sued in the Arbitration for breach of his agreement to act as an investment banker or out of his professional duties of care." Trailblazer further states that in the arbitration, Regas was only named in claims for fraud in the inducement, negligent misrepresentation, and fraud.

However, "California employs the primary rights theory to determine if two successive proceedings involve the same cause of action. [Citations.] Under the primary rights theory, '. . . the invasion of one primary right gives rise to a single cause of action. [Citations.]' [Citation]. ' "[A] cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant [that breaches the] primary right and duty. . . ." ' [Citation.] The existence of a cause of action 'is based upon the harm suffered, as opposed to the particular theory asserted by the litigant.' [Citations.]" (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 557; accord, *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

Trailblazer's arguments focus on the labels of the causes of action but not on the substance of the proceedings.

First, when Regas represented to Trailblazer that RapidText's assets were worth $500,000, he not only made misrepresentations, but also breached his duties owed to Trailblazer. Given the facts of this case, the concepts are inextricably intertwined. Judge Saeta addressed this overlap in his findings by stating that there were intentional, material misrepresentations and "[i]t appears to me as [Trailblazer's] agent and an expert in investment banking, that Regas should have tested the veracity of Woods' numbers."

Second, the SAEC allegations are not as limited as described by Trailblazer as Trailblazer also accused Regas of making retroactive accounting changes.

Third, Trailblazer has not explained why it could not litigate all of its accusations against Regas in the arbitration. As Trailblazer admitted, Regas's failure as a fiduciary related to the value of the entertainment assets – issues that were explicitly discussed and ruled upon by Judge Saeta in the arbitration.

Lastly, Regas's dual role as an agent for Trailblazer and as an agent for RapidText drew him into many aspects of the contested merger and the resulting harm to Trailblazer. In the SAEC, Regas was charged with being an agent, joint venturer, successor-in-interest, employee, and partner of RapidText, Woods, and Johnson. Therefore, Regas was connected to the other allegations being asserted against RapidText.

Thus, res judicata bars Trailblazer from litigating this civil lawsuit against Regas.

IV.
DISPOSITION

The judgment is affirmed. Plaintiffs and appellants Trailblazer Technologies, Inc. and Richard J. Brownstein II are to pay all costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.